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Opinion No. 07-96

Random Drug Testing for Students in Voluntary Extracurricular Activities

QUESTION

May elementary and secondary students in Tennessee who participate in voluntary extracurricular activities be subject to random drug testing, conducted in the absence of individualized reasonable suspicion?

OPINION

No. The controlling statute, Tenn. Code Ann. § 49-6-4213, allows drug testing of a student only when there are reasonable indications to the principal that the student may have used or may be under the influence of drugs. Random drug testing violates that statute.

ANALYSIS

The Fourth Amendment to the United States Constitution and Article I, § 7, of the Tennessee Constitution[1] protect citizens from unreasonable searches and seizures by the government. The United States Constitution, amend. 4, says, in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

And the Tennessee Constitution, art. I, § 7, similarly states:

> [T]he people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures . . . .

[1]The Tennessee Supreme Court has stated that Tenn. Const., art. I, § 7, is identical in intent and purpose to the U.S. Const., amend. 4. *See, e.g., Sneed v. State*, 221 Tenn. 6, 13, 423 S.W.2d 857, 860 (1968). The Court, however, may interpret the state constitution to afford greater rights than the federal constitution, even when the provisions are identical. *See Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 14-15 (Tenn. 2000).

In two decisions, *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995), and *Pottawatomie County v. Earls*, 536 U.S. 822 (2002), the United States Supreme Court held that schools conducting random drug tests of students involved in voluntary extracurricular activities, in the absence of individualized reasonable suspicion, do not violate the student's reasonable expectation of privacy. Thus, the Court held, such testing does not violate the students' rights under the Fourth Amendment to the United States. *Pottawatomie County*, 536 U.S. at 837-38,[2] *Vernonia Sch. Dist.*, 515 U.S. at 664-65.[3] Looking only at these holdings, one might conclude that Tennessee school districts may conduct random drug testing, even in the absence of reasonable suspicion of drug use.

Tennessee law, however, prohibits public school drug testing that is not premised upon a reasonable indication of drug use. The statute states as follows:

> A student may be subject to testing for the presence of drugs in the student's body in accordance with this section and the policy of the LEA if there are reasonable indications to the principal that such student may have used or be under the influence of drugs. The need for such testing may be brought to the attention of the principal through a [locker] search authorized by § 49-6-4204 or § 49-6-4205 [physical search], observed or reported use of drugs by the student on school property, or other reasonable information received from a teacher, staff member or other student.

Tenn. Code Ann. § 49-6-4213(a). In addition, the statute sets standards of reasonableness that must be met and establishes other requirements, for example, that a school district must have an established drug testing policy and must tell students when they enroll that they may be subject to testing. This state statute is not in conflict with the United States and Tennessee constitutional provisions quoted above. In fact, it provides the individual student with more protection against search and seizure than the constitutional provisions do under the United States Supreme Court's interpretation of the federal constitution in the *Vernonia* and *Pottawatomie* cases. The state statute is well within legislative authority. The General Assembly may do all things not prohibited by the state or federal constitutions. *Bell v. Bank of Nashville,* 7 Tenn. 269, 1823 WL 502, *2 (1823).

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[2]In finding that the school district's drug testing policy did not violate the Fourth Amendment to the United States Constitution, the Court stated, "Tecumseh's [Student Activities Drug Testing] Policy is a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren." *Pottawatomie*, 536 U.S. at 838.

[3]The United States Supreme Court stated, "Taking into account all the factors we have considered above — the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search — we conclude Vernonia's [Student Athlete Drug] Policy is reasonable and hence constitutional." *Vernonia Sch. Dist.*, 515 U.S. at 664-65.

We conclude, therefore, that school districts must comply with Tenn. Code Ann. § 49-6-4213(a) and may not conduct random drug testing. In the absence of reasonable indications that the student may have used or be under the influence of drugs, state law does not permit the student to be tested for drugs.

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